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We Have a "Purpose" Requirement If We Can Keep It

James F. Flanagan

University of South Carolina - Columbia, flanagjf@law.sc.edu

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WE HAVE A “PURPOSE” REQUIREMENT IF WE CAN KEEP IT

by
James F. Flanagan*

The Supreme Court in Giles v. California held that a defendant forfeits the right to confront a witness only when he purposefully keeps the witness away. Many see the “purpose” requirement as an unjustified bar to the use of victim hearsay, particularly in domestic violence prosecutions where victims often refuse to appear. The author defends Giles as a correct reading of history, and independently justified by long-standing precedent that constitutional trial rights can only be lost by intentional manipulation of the judicial process. Moreover, the purpose requirement does not prevent prosecutions or convictions because the definition of testimonial hearsay is narrow, other victim hearsay often is available, and prosecutors have proven “purpose” for decades. Nevertheless, the purpose requirement of Giles, and ultimately Crawford’s protection of the Confrontation Clause, will be undermined unless the courts require strict “but for” proof of the reason for the witness’s absence, including proof that the witness did not have independent personal reasons for avoiding testifying. The government’s good faith obligation to produce witnesses must be strengthened to avoid making forfeiture so easy that there is a perverse incentive to rely on it, rather than diligently seeking and producing witnesses. The author concludes by identifying the problems in using expert testimony to infer causation only from a prior history of domestic discord.

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* Oliver Ellsworth Professor of Federal Practice, University of South Carolina School of Law. A.B. University of Notre Dame, 1964, L.L.B. University of Pennsylvania, 1967. My thanks to Professor Beloof for including me in the Symposium on the Confrontation Clause held at Lewis & Clark Law School on January 30, 2009, and to the other participants who have deep insights into the Crawford revolution and from whom I have benefitted greatly: Professor Douglas Beloof of Lewis and Clark Law School, Professor Thomas Davies of the University of Tennessee Law School, Professor Richard Friedman of the University of Michigan, Robert Kry, Professor Tom Lininger of the University of Oregon Law School, Professor Robert Mosteller of Duke Law School, and Professor Deborah Tuerkheimer of the University of Maine Law School.

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I. INTRODUCTION

The struggle to maintain the Constitution that Benjamin Franklin predicted¹ is the same that faces the newly strengthened Confrontation Clause created by *Crawford v. Washington*.² *Crawford* finally gave the Confrontation Clause teeth by barring testimonial hearsay unless there was an opportunity for cross-examination. *Giles v. California* limited forfeiture by wrongdoing, the most significant exception to *Crawford*, by holding that it required proof that the defendant acted with the purpose of preventing the witness from testifying.³

The Symposium on the Confrontation Clause organized by Professor Beloof came at an opportune time. *Giles* completes a trilogy of cases that created the Confrontation Clause's modern approach to hearsay, defined testimonial hearsay, and limited forfeiture by wrongdoing. Yet *Giles* reveals clear strains about *Crawford*, and the intent requirement in the context of domestic violence prosecutions where witness intimidation occurs often. Similar strains appear in *Melendez-Diaz v. Massachusetts*, which held that crime lab reports are testimonial hearsay requiring that the defendant have the opportunity to cross-examine the technician.⁴

The Court in *Giles*, which had been united in its two earlier decisions on the Confrontation Clause,⁵ produced five opinions in a 6–3 decision.⁶ They reveal two fault lines. The first is the significance of history in

¹ Franklin was approached by a woman on the last day of the Constitutional Convention and asked whether the convention had created a republic or a monarchy. Franklin replied: "A republic . . . if [we] can keep it." 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, 85 (Max Farrand ed., rev. ed. 1966).

² 541 U.S. 36 (2004).

³ *Giles*, 128 S. Ct. 2678 (2008).

⁴ 129 S. Ct. 2527 (2009).

⁵ Chief Justice Rehnquist and Justice O'Connor concurred in *Crawford*, 541 U.S. at 69–76, and Justice Thomas concurred in *Davis v. Washington*, 547 U.S. 813, 833–42 (2006). The concurring justices did not comment on the forfeiture doctrine in either case.

⁶ *Giles*, 128 S. Ct. at 2695 (justices Breyer, Stevens, and Kennedy dissenting).

defining the Confrontation Clause. Justice Scalia and the Chief Justice found the intent requirement solely in the history of the Confrontation Clause.⁷ Justices Thomas and Alito concurred in the Court's opinion, but would have held that the statement to the officer was not testimonial hearsay, had that issue not been conceded in the lower court.⁸ Justices Souter and Ginsburg also concurred, finding that the case law required a showing of intent, and that it was equitable to place the burden of untrue hearsay on the person who kept the witness away, but that history said nothing about forfeiture in the context of domestic violence.⁹ Justice Breyer, joined by Justices Kennedy and Stevens, rejected the majority's view of history and sought to find the answer in the purposes of the rule.¹⁰ This topic has been ably addressed at the symposium by Robert Kry, the author of the amicus brief in *Giles* on behalf of National Association of Criminal Defense Lawyers,¹¹ and Professors Davies and Mosteller, who are well-known commentators on history, evidence, and the Constitution.

The second fault line is the future application of forfeiture by wrongdoing particularly in domestic violence prosecutions. Professors Deborah Tuerkheimer, Tom Lininger, and Richard Friedman have commented on this topic and it is the focus of my Article. As a counsel for Dwayne Giles in the Supreme Court, and with an interest in forfeiture by wrongdoing that predated *Crawford*, I believe that *Giles* was correctly decided.¹² In fact, without a purpose or intent requirement, *Crawford* would be of limited use, perhaps relevant to statements by co-defendants, but with little impact whenever the prosecution could mount a plausible claim that the witness's absence could be connected to the defendant.

The particular challenge of domestic violence prosecutions is that the complaining witnesses often are reluctant to testify or do not testify at all. Witness intimidation is responsible for much of this, but it is conceded by all that the witnesses often have independent, personal

⁷ *Id.* at 2682–88.

⁸ *Id.* at 2693–94.

⁹ *Id.* at 2694–95.

¹⁰ *Id.* at 2695–709.

¹¹ Brief of the Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae in Support of Petitioner, *Giles v. California*, 128 S. Ct. 2678 (2008) (No. 07-6053).

¹² James F. Flanagan, *Foreshadowing the Future of Forfeiture/Estoppel by Wrongdoing: Davis v. Washington and the Necessity of the Defendant's Intent to Intimidate the Witness*, 15 J.L. & POL'Y 863 (2007) [hereinafter Flanagan, *Foreshadowing the Future*]; James F. Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 WM. & MARY BILL RTS. J. 1193, 1209–18 (2006) [hereinafter Flanagan, *Confrontation, Equity, and the Misnamed Exception*]; James F. Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding its Grasp and Other Problems with Federal Rule of Evidence 804(b)(6)*, 51 DRAKE L. REV. 459 (2003) [hereinafter Flanagan, *A Reach Exceeding its Grasp*].

reasons for not wanting to make themselves available in court.¹³ *Giles* properly distinguishes between the two situations by requiring proof of the goal or intent to keep the witness away, and by proof that the defendant's wrongdoing was, in fact, the cause of the witness's failure to appear, rather than the witness's independent decision, or the government's failure to produce the witness.

My concern is that the understandable zeal to convict domestic batterers will lead to minimal standards for proof of intent and causation and will undermine the constitutional protections in *Giles*, ultimately making it easier to use testimonial hearsay than to produce the witness at trial. *Crawford* and *Giles* do not unreasonably restrict the prosecution of these cases and they are easily satisfied by proper investigation and prosecution. I also advocate a strong "but for" proof of causation of the witness's absence, an enhanced "due diligence" standard for the government to satisfy before a witness may be found unavailable, and conclude with some criticisms and concerns about attempting to establish causation and unavailability solely through evidence of a history of domestic violence.

II. *GILES* AND THE INTENT REQUIREMENT DO NOT SOLELY DEPEND UPON HISTORY

I have little to offer on the history of the Confrontation Clause that has not been said. For me, the most significant fact is that all the forfeiture cases from 1666 until *Crawford* were obvious witness tampering cases.¹⁴ The cases that found forfeiture without such tampering were decided after, and often explicitly to avoid, *Crawford*.¹⁵ There is only one

¹³ Tom Lininger, *Yes, Virginia, There is a Confrontation Clause*, 71 BROOK. L. REV. 401, 407 (2005); Myrna Raeder, *Remember the Ladies and the Children Too: Crawford's Impact on Domestic Violence and Child Abuse Cases*, 71 BROOK. L. REV. 311, 361–62 (2005).

¹⁴ *Lord Morley's Case* was a pre-trial ruling in a murder case, holding that the sworn statement of a witness taken at a coroner's inquest could be admitted if the witness had been kept away by "the means or procurement of the prisoner." Kel. 53, 55, 84 Eng. Rep. 1079, 1080, 6 How. St. Tr. 769, 771 (H.L. 1666). The prosecution failed to establish Lord Morley's responsibility at trial. *Lord Morley's Case*, 6 How. St. Tr. at 776–77. In *Reynolds v. United States* the defendant concealed the witness. 98 U.S. 145 (1879). The modern cases on forfeiture by wrongdoing all involved witness tampering. See, Flanagan, *A Reach Exceeding its Grasp*, *supra* note 12, at 484–87 (describing witnesses and intimidation in the modern cases).

¹⁵ The California Supreme Court in *Giles* admitted that forfeiture without intent was a reaction to *Crawford*. "After *Crawford*, the response of many courts (including the Court of Appeal in this case) was to focus on the equitable forfeiture rationale which could eliminate the need for evidence of witness tampering and broaden the scope of the rule to all homicide cases." *People v. Giles*, 152 P.3d. 433, 440 (Cal. 2007), *rev'd sub nom.* *Giles v. California*, 128 S. Ct. 2678 (2008). Similarly, the Wisconsin Supreme Court stated: "In essence, we believe that in a post-*Crawford* world the broad view of forfeiture by wrongdoing . . . utilized by various jurisdictions since *Crawford's* release is essential." *State v. Jensen*, 727 N.W.2d 518, 535 (Wis. 2007).

pre-*Crawford* case that suggests that intent may be unnecessary.¹⁶ The Court's ultimate rationale for *Giles* was the lack of support for the California Supreme Court's position that a homicide automatically forfeited a constitutional right. The opinion for the Court concludes: "We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter."¹⁷ The State of California simply failed to carry the burden of establishing a new exception to the Confrontation Clause.

The debate over the relevance of the history of the Confrontation Clause, however, does not undercut the purpose requirement established in *Giles*. There is independent support for the decision and the purpose requirement. Witness tampering is one example of a long established rule that a defendant can forfeit constitutional protections by attempting to improperly manipulate constitutional rights to the derogation of the integrity of the judicial process.

Reynolds v. United States, the original forfeiture by wrongdoing case, was one of the first cases illustrating the principle.¹⁸ *Reynolds* held that the defendant could not conceal the witness yet insist on his right to confront the now absent witness.¹⁹ Nor could the defendant voluntarily stay away from the trial and maintain that his conviction was unconstitutional because of that absence.²⁰ Similarly, the right of confrontation requires compliance with rules of procedure. The defendant must give notice of an intended defense²¹ or of prospective witnesses.²² Moreover, the defendant who testifies must submit to cross-examination,²³ and cannot consult with counsel in the middle of the examination.²⁴ And, while the prosecution cannot use illegally obtained

¹⁶ *United States v. Rouco*, 765 F.2d 983, 994–95 (11th Cir. 1985). A close reading of the case shows that the court spent most of the opinion reviewing the facts to establish that the statement was reliable and consistent with other evidence, rather than an analysis leading to a new rule.

¹⁷ *Giles*, 128 S. Ct. at 2693.

¹⁸ 98 U.S. 145, 158 (1879).

¹⁹ The opinion in *Reynolds* emphasized the defendant's deliberate tactical choice about his defense. "Having the means of making the necessary explanation [of the witness's location], and having every inducement to do so if he would, the presumption is that he considered it better to rely upon the weakness of the case made against him than to attempt to develop the strength of his own." *Id.* at 160.

²⁰ *Motes v. United States*, 178 U.S. 458, 472 (1900).

²¹ *Michigan v. Lucas*, 500 U.S. 145 (1991) (holding that the defendant does not have a right to ignore a notice of defense rule).

²² *Taylor v. Illinois*, 484 U.S. 400, 410 (1988) (holding that the Compulsory Process Clause does not create absolute bar to the exclusion of witness for failure to comply with state's rule requiring witnesses to be identified).

²³ *Fitzpatrick v. United States*, 178 U.S. 304, 315–16 (1900) (holding a defendant electing to testify must submit to cross-examination).

²⁴ *Perry v. Leeke*, 488 U.S. 272, 284 (1989) (holding the right to the assistance of counsel does not include consultation with counsel between direct and cross-examination).

evidence in its case in chief, it may impeach the defendant when his testimony is inconsistent with this evidence.²⁵ And of course the defendant must comport himself appropriately, or face exclusion from the courtroom.²⁶ The Court in *Davis* tightly linked the forfeiture rule to the manipulation of the judicial process.

[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.²⁷

These cases establish a broad principle of forfeiture by manipulation that is applicable to all of the trial rights, not just confrontation. They are the true equitable basis for forfeiture founded on the maxim that the defendant should not benefit from his own wrongful manipulation of the judicial process.²⁸ The Court even has applied the equitable principle to the government when it sought to retry an acquitted defendant on the theory that its defective indictment voided a claim of double jeopardy.²⁹

This is a judicial response to manipulation of the trial process and does not depend upon the common law in 1789, and all the uncertainties that this symposium detailed. These precedents reflect the proper role of constitutional rights. All defendants have constitutional rights regardless of the crime charged, even if they make it harder for the prosecution to obtain a conviction. In fact, that is their purpose.

At the same time, a particular defendant can lose a constitutional right when he manipulates the trial process. The intentional attack on the judicial process to gain an unfair advantage is the triggering act, not the crime charged. That affront to the judicial process is the only basis for eliminating a constitutional right, and easing the state's constitutional obligations. Otherwise, constitutional rights would vary on the needs or whims of the government and not the defendant. Under these precedents, intent arises as an inherent requirement of the forfeiture of

²⁵ *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding that "*Miranda*" cannot be a shield to allow the defendant to testify inconsistently with prior voluntary but suppressed statements); *Walder v. United States*, 347 U.S. 62, 64–65 (1954) (holding that defendant may be impeached with illegally seized and suppressed evidence).

²⁶ *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (holding that defendant could be excluded from courtroom because of repeated outbursts).

²⁷ *Davis v. Washington*, 547 U.S. 813, 833 (2006) (emphasis in original).

²⁸ The Court has cited the maxim where there was interference with the judicial process. *Allen*, 397 U.S. at 349 (Brennan, J., concurring); *Diaz v. United States*, 223 U.S. 442, 457–58 (1912) (citing *Falk v. United States*, 15 App. D.C. 446, 454, 460 (D.C. Cir. 1899)); *Motes v. United States*, 178 U.S. 458, 471–72 (citing *Reynolds v. United States*, 98 U.S. 145 (1879)).

²⁹ *United States v. Ball*, 163 U.S. 662, 667–68 (1896) (holding that the prosecution cannot take advantage of its defective indictment to avoid claim of double jeopardy when defendant was acquitted at first trial).

constitutional rights, and not, as the critics of *Giles* claim, as an artifact of the particular history of the common law. In fact, case law, as well as history, independently support the intent requirement.

III. CRAWFORD AND GILES IN CONTEXT

A. Crawford and Giles Have a Limited Effect

Much of the rhetoric about *Crawford* and *Giles* is overwrought with claims that these cases will have devastating effects on prosecutions for domestic violence, and perhaps crimes against children.³⁰ While *Crawford* may have revolutionized the Confrontation Clause’s approach to hearsay, its effect, as a practical matter, is likely to be small.³¹ Testimonial hearsay is generally limited to statements made to government agents during the investigation of a crime. Statements made to the police during an emergency response,³² or to third parties at any time are outside the definition of testimonial hearsay and are admissible, subject to the requirements of an exception to the rule against hearsay.³³ Although some testimonial statements may be excluded, many comparable statements to nongovernment actors are admissible.³⁴

³⁰ Five of the seven amicus briefs in support of the State of California made these claims. Brief of the Nat’l Ass’n to Prevent Sexual Abuse of Children’s Nat’l Child Protection Training Center as Amicus Curiae in Support of Respondent, *Giles v. California*, 128 S. Ct. 2678 (2008) (No. 07-6053); Amicus Curiae Brief of the Battered Women’s Justice Project and Other Domestic Violence Org. in Support of Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053); Brief of the Nat’l Ass’n of Counsel for Children and the Am. Prof’l Soc’y on the Abuse of Children as Amici Curiae in Support of Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053); Brief of Richard D. Friedman as Amicus Curiae in Support of Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053); Brief of the Domestic Violence Legal Empowerment and Appeals Project to End Domestic Violence, Legal Momentum, et al. as Amici Curiae in Support of Respondent, *Giles*, 128 S. Ct. 2678 (No. 07-6053).

³¹ *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), may be the exception because the holding that reports from crime labs are testimonial requires the prosecution to provide an opportunity to cross-examine the technician. However, that decision does not involve forfeiture by wrongdoing.

³² *Davis*, 547 U.S. at 821–22; *Giles*, 128 S. Ct. at 2693–94.

³³ *Giles*, 128 S. Ct. at 2693. There are jurisdictions, however, that hold that the forfeiture of confrontation also forfeits any evidence objections. See *United States v. White*, 116 F.3d 903 (D.C. Cir. 1997); *United States v. Houlihan*, 92 F.3d 1271, 1281 (1st Cir. 1996) (finding defendants’ “misconduct waived not only their confrontation rights but also their hearsay objections, thus rendering a special finding of reliability superfluous”); *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982) (holding if a defendant forfeits his or her right to confrontation, he or she *a fortiori* waives any hearsay objection). State courts have also followed this approach. *Devonshire v. United States*, 691 A.2d 165, 168–69 (D.C. 1997); *State v. Hallum*, 606 N.W.2d 351, 358 (Iowa 2000).

³⁴ While it may be odd that the Confrontation Clause addresses only victim hearsay to police officers, and not the same statements made to civilians, it is consistent with the Court’s theory of the Confrontation Clause. *Crawford* was aimed, in part, at limiting the government’s ability to create evidence through its agent’s

The limited impact of *Giles* on prosecutions can be seen in a special sample of cases. In preparing for oral argument in *Giles*, I reviewed the ten state supreme court decisions and one opinion from a federal court of appeals that had addressed the intent issue and that created the split in the case law requiring Supreme Court review.³⁵ These eleven cases included prosecutions for domestic violence, homicides, child sexual assaults and witness tampering in general crimes. The admissibility of these testimonial statements apparently was important enough to appeal to the highest state court, and a federal court of appeals. Examination of the facts shows that *Crawford* and *Giles* can be satisfied in several ways, and rarely prevent a conviction.

In two cases, the statements were not testimonial as later defined in *Davis*, so the challenged statements would be admissible without considering forfeiture.³⁶ In four cases, there were comparable victim statements to nongovernment actors, so the same evidence would be presented to the jury.³⁷ Two others had proof of the intent to prevent the witness from testifying that satisfied the forfeiture rule.³⁸ In the federal case, which was final before *Giles*, the exclusion of the testimonial statement of a prior incident would not have affected the conviction

statements, rather than present the witness at trial. When the victim is unavailable to testify, reliance on civilian hearsay statements does restrict the government's ability to create evidence through its own agents. The prosecution must find and produce a witness unaffiliated with the government. A civilian witness, unlike a government agent, is not likely to be as experienced or skilled at testifying, nor clothed with the authority and perceived neutrality of a police officer. The witness's potential biases or relationship to the victim are more easily identified and considered by the jury, which is in a better position to evaluate such testimony.

³⁵ Petition for Writ of Certiorari at 12–14, *Giles*, 128 S. Ct. 2678 (No. 07-6053).

³⁶ *State v. Mechling*, 633 S.E.2d 311, 323–24 (W. Va. 2006) (remanding case to determine if statements made by victim to neighbor at scene were testimonial); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004) (statement to decedent at scene identifying defendant would satisfy responding to emergency requirement, perhaps the dying declaration, and homicide was witnessed by others).

³⁷ *People v. Stechly*, 870 N.E.2d 333, 366 (Ill. 2007) (statements of child witness to mother nontestimonial, and statements to police and nurse were testimonial); *State v. Romero*, 156 P.3d 694 (N.M. 2007) (statements victim made to mother and to friend, and officer's description of her at scene admissible although her grand jury testimony and recorded statement were not); *State v. Jensen*, 727 N.W.2d 518, 536 (Wis. 2007) (statements made to neighbor and son's teacher nontestimonial, and statements to officer and letter to neighbor were testimonial); *State v. Mason*, 162 P.3d 396, 405 (Wash. 2007) (harmless error in admitting statements to police when comparable statements to roommate, supervisor, treating physician, and sister, as well as DNA evidence linked him with the murder).

³⁸ *Commonwealth v. Edwards*, 830 N.E.2d 158, 174–75 (Mass. 2005) (remanding for trial court to review for the first time recorded conversations between defendant and witness regarding arrangements for witness not to testify); *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004) (intent to prevent testimony established).

because the defendant conceded the murder and only argued that he was not guilty of first degree murder because of intoxication.³⁹

In two of the three remaining cases, *Giles* was not decisive. The Colorado Supreme Court held that a videotaped statement of a child assault victim was testimonial and affirmed the reversal of the defendant's conviction in *People v. Moreno*.⁴⁰ The child was unavailable because of the stress of testifying, so the videotape might have been the key evidence. However, before trial, the defense had moved to depose the child outside the presence of the defendant and the motion was denied.⁴¹ Had the defense offer been accepted, *Crawford* would have been satisfied and the child's testimony admitted because there had been an opportunity for cross-examination. The ultimate reason for the excluding the victim's statement was not *Crawford*, but the unwillingness of the prosecution to adapt to it. This is a self-inflicted wound. Professor Friedman has argued that the state has an obligation to take steps to preserve the witness's statements when there is a possibility that the witness will not testify.⁴² *Moreno* is certainly one case where the government had some obligation to accept the defense offer and could not complain if the testimonial statement was subsequently excluded.

In one case, the state declined to prosecute on remand.⁴³ The defendant had been convicted of murdering his girlfriend but the conviction was reversed because of an error in the instructions.⁴⁴ After the murder conviction, he was tried for an assault four months before her death. The assault conviction was reversed because of the improper admission of testimonial statements.⁴⁵ On remand, the state dismissed the assault charge, although the victim had made statements about the assault to a friend and her mother on the day of the assault.⁴⁶ The New Mexico Supreme Court had previously noted that there was sufficient

³⁹ United States v. Garcia-Meza, 403 F.3d 364, 367–68 (6th Cir. 2005) (opinion was written before *Davis* was decided, and does not discuss whether the challenged statement was made during an emergency and does not provide sufficient details to resolve that question).

⁴⁰ 160 P.3d 242, 243 (Colo. 2007).

⁴¹ *Id.* at 243–44.

⁴² See, e.g., Posting of Richard D. Friedman to The Confrontation Blog, *Forfeiture, The Prosecutorial Duty to Mitigate, and Rae Carruth*, <http://confrontationright.blogspot.com/2005/03/forfeiture-prosecutorial-duty-to.html> (Mar. 4, 2005).

⁴³ State v. Romero, 156 P.3d 694 (N.M. 2007). E-mail from Will O'Connell, Counsel on Appeal for Romero, to James F. Flanagan (Feb. 27, 2009) (on file with author).

⁴⁴ *Romero*, 156 P.3d at 696 (describing murder conviction).

⁴⁵ *Id.* at 703. On retrial for the homicide, the defendant was convicted of aggravated battery. E-mail from Will O'Connell, *supra* note 43. That may be an appropriate verdict in light of the evidence of excessive drinking, mutual assault, and admitted health problems of the decedent as recited by the court. State v. Romero, 112 P.3d 1113, 1114–15 (N.M. 2005).

⁴⁶ State v. Romero, 133 P.3d 842, 847 (N.M. Ct. App. 2006), *aff'd*, 156 P.3d 694 (N.M. 2007).

evidence to convict the defendant without the challenged statement.⁴⁷ Perhaps the pending retrial of the more serious charge of homicide was a practical reason not to proceed, but it was not the exclusion of evidence under *Crawford* or *Giles*.

Finally, I believe that a retrial of *Giles* might well result in an acquittal, or at least a conviction on a lesser offense than first degree murder. The testimonial statement about the prior assault was the only testimony that the defendant harbored any animus toward the victim, and it triggered a jury instruction that the intent to assault in the prior incident could be used to infer intent in the homicide.⁴⁸ There was substantial support for his self-defense claim since the evidence clearly established that on the fatal evening the decedent continually sought a confrontation with the defendant and his new girlfriend.⁴⁹

These cases identify several ways in which *Giles* can be satisfied and a conviction obtained. At the least, it is premature to claim that *Giles* will undermine domestic violence prosecutions. *Giles* is a clear direction to

⁴⁷ *Romero*, 156 P.3d at 700.

⁴⁸ The testimonial statement to the officer related a prior assault where the defendant threatened to kill Ms. Avie if she left him. There is no evidence in the record that the defendant was arrested although he was present when the police arrived. Immediately after the oral argument before the Court, Ms. Marilyn Burkhardt, counsel of record for *Giles*, talked with the former prosecutor in the murder trial who had attended the argument. He reported to her that he recalled that the complaint had been withdrawn. Conversation between author and Marilyn G. Burkhardt, Defense Counsel for *Giles*, in Washington, D.C. (Apr. 22, 2008). There is reason to doubt the accuracy of the testimonial statement because Ms. Avie said that she had been thrown to the floor and punched in the face. This violence was inconsistent with the officer's statement that he saw no marks on her and felt only a bump on her head. *People v. Giles*, 152 P.3d 433, 436–37 (Cal. 2007), *rev'd sub nom. Giles v. California*, 128 S. Ct. 2678 (2008).

⁴⁹ The California Supreme Court reported the defense evidence as follows: Dwayne Giles had a new girlfriend, Ms. Tameta Munks. Ms. Avie continued to contact him. On the night of the homicide, Ms. Avie called and wanted to visit him at his grandmother's house where he was staying. Dwayne told her that Ms. Munks was there and attempted to dissuade her, but she came nevertheless. At his urging Ms. Munks left before Ms. Avie arrived and interrupted a small party playing records in the garage. Tensions rose, and Dwayne ended the party and told everyone to leave. Shortly thereafter, Ms. Avie apparently saw Ms. Munks and suspected she was returning to the garage. Ms. Avie then left a friend, saying that she was going to confront them both. There were no witnesses to the actual shooting. Dwayne testified that she came at him, and he, aware of her repeated threats against him and the new girlfriend, as well as evidence of her prior assaultive behavior against others, retrieved a gun and shot her. He has more than a plausible claim of self-defense. In fact, he had done everything possible to avoid a confrontation that was instigated by Ms. Avie, unfortunately with fatal effect. *Giles*, 152 P.3d at 435–36. Those who think I might be too close to the facts should reverse the genders and assume that *Giles* had been the instigator, threatening and pursuing Ms. Avie and her new boyfriend that evening.

On remand from the Supreme Court and the California Supreme Court, the California Court of Appeal reversed the conviction and remanded for a new trial on February 25, 2009. *People v. Giles*, No. B166937, 2009 WL 457832 (Cal. Ct. App. Feb. 25, 2009).

the police and prosecutors to work to produce the witness, or to establish the elements of forfeiture, so there should be fewer cases where a testimonial statement is essential to the prosecution. Certainly, the intent requirement of *Giles* did not present a significant problem in many prosecutions. Federal and state prosecutors routinely established the necessary intent or purpose under Federal Rule of Evidence 804(b)(6) before *Crawford*.⁵⁰ Since these were generally organized crime or drug conspiracy cases, with witness intimidation rivaling domestic violence prosecutions, it indicates that there are no insurmountable problems in establishing an intentional forfeiture in other cases. Finally, violations of the Confrontation Clause are subject to the harmless error analysis. The fact that harmless error has been found also indicates that use of testimonial hearsay is often unnecessary.

B. *Crawford, Giles and the Challenges of Domestic Violence*

Giles is most relevant in nonfatal domestic violence prosecutions. The complaining witness is physically capable of appearing in court, and to establish forfeiture the prosecution must show that the purpose of the wrongdoing was to prevent the witness from testifying, the goal of the wrongdoing was in fact achieved, and the absence was not the result of the witness's independent decision to stay away from the trial.

Complaining witnesses often are reluctant to testify against their domestic partners in domestic violence prosecutions. The reasons are complex. The lives of the witness and the defendant are intertwined by a past relationship and often by the potential of some relationship in the future. Witness intimidation by the defendant occurs in some cases, and in others, the witness has independent reasons for refusing to testify that are not chargeable to the defendant. Even in the best of times, testifying is inherently stressful.⁵¹ The nature of criminal prosecutions also has an effect. Most domestic violence prosecutions are misdemeanors, which may have a lower claim on police and prosecutorial resources.⁵² The impersonal nature of the prosecutorial process adversely affects many potential witnesses. At the same time, social support programs have proven effective in improving witness appearance rates.⁵³

⁵⁰ See Flanagan, *A Reach Exceeding its Grasp*, *supra* note 12, at 485 & n.162.

⁵¹ See, e.g., *Maryland v. Craig*, 497 U.S. 836, 856 (1990) (finding that protections for child witnesses are not available solely because of the normal anxiety of testifying).

⁵² Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 582 (2007).

⁵³ See JOANNE BELKNAP & DEE L. R. GRAHAM, FACTORS RELATED TO DOMESTIC VIOLENCE COURT DISPOSITIONS IN A LARGE URBAN AREA: THE ROLE OF VICTIM/WITNESS RELUCTANCE AND OTHER VARIABLES 171–74 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/184232.pdf> (listing recommendations for reducing victim reluctance to testify); Richard Devine, *Targeting High Risk Domestic Violence Cases: The Cook County, Chicago, Experience*, 34 PROSECUTOR Mar.–Apr. 2000, at 30, 30–31 (explaining program that provided support to victims of domestic violence and

The critical challenge for *Giles* is whether courts applying the decision will properly distinguish cases where forfeiture is justified, because there was proof of causation, from those where the witness's failure to appear is not chargeable to the defendant because it was due to an independent decision of the witness or the failure of the government to produce the witness.⁵⁴ There are very strong pressures to apply forfeiture whenever possible. *Giles* has few friends, and many who believe the case is an impediment to successful prosecutions of these types of cases. Although obtaining the appearance of witnesses is a multifaceted problem, the emphasis has been on using the forfeiture rule to admit testimonial hearsay without the presence of the witness.

In my view, it is essential that the courts require specific individualized proof not only of the defendant's purpose, but also of the link between the wrongdoing and the witness's failure to appear. Confrontation is a constitutional trial right, and one that goes to the reliability and acceptability of the verdict. Hearsay is suspect as a matter of evidence law, as well as the Constitution. As Justice Souter said, "[i]t was, and is, reasonable to place the risk of untruth in an unconfronted, out-of-court statement on a defendant who meant to preclude the testing that confrontation provides."⁵⁵ The forfeiture rule has never been justified by the inherent reliability of the hearsay, and placing the risk of untruth on the defendant without such proof increases the risk of a wrongful conviction.⁵⁶

Many have argued that the special circumstances of domestic violence require a more lenient approach to the admissibility of testimonial statements.⁵⁷ However, Justice Scalia is correct. There is simply no way to have a special rule only for domestic violence cases.⁵⁸

resulted in eighty percent of victims appearing for trial); Tom Lininger, *Prosecuting Battered After Crawford*, 91 VA. L. REV. 747, 783-818 (2005) (discussing various proposals to maximize opportunities for cross-examination and the admission of constitutionally permissible hearsay statements of victims of domestic violence).

⁵⁴ The witness's motivation is often the desire to preserve emotional, financial, and family connections, and identifying the true motivation may be difficult in many cases. However, only wrongdoing supports forfeiture, and these other factors are not wrongdoing. This is seen by presenting the issue in another context: one would not find an executive unavailable as a witness if he declined to testify because it would destroy a valuable (and legitimate) financial or social relationship with the target of the testimony.

⁵⁵ *Giles v. California*, 128 S. Ct. 2678, 2694 (2008) (Souter, J., concurring in part).

⁵⁶ See, e.g., Anthony Bocchino & David Sonenshein, *Rule 804(b)(6)—The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 MO. L. REV. 41 (2008) (arguing that the forfeiture rule lacks any traditional indicia of trustworthiness).

⁵⁷ See, e.g., *Davis v. Washington*, 547 U.S. 813, 833 (2006) (noting that the states and others argued that domestic violence cases required "greater flexibility in the use of testimonial" hearsay).

⁵⁸ *Giles*, 128 S. Ct. at 2693.

Any precedents in the context of domestic violence will inevitably affect application of the forfeiture rule in all other crimes. The conflict over whether a witness will testify against a domestic partner (as well as the opportunity for intimidation), comes from the preexisting relationship between the defendant and the complaining witness. This relationship is not unique to domestic violence. The same factors also describe many other situations where witnesses are reluctant to testify, including organized crime cases, business conspiracies, and crimes within a neighborhood where people know both perpetrator and victim. Finally, the number of domestic violence prosecutions, and opinions explaining the forfeiture rulings, will drive the future of forfeiture. So, it is inevitable that any precedent applied in domestic violence cases will also be applied to forfeiture in all criminal cases.

I have argued that without an intent requirement, forfeiture is inherently unlimited.⁵⁹ It can, and will be, applied whenever there is any plausible argument that the witness's failure to appear could be connected to the defendant's wrongdoing. The State of California argued that forfeiture applied in any homicide case, and others have argued that forfeiture was appropriate in any domestic violence prosecution.⁶⁰ For similar reasons, now that intent is required, it is equally important that the courts demand proof of the intent requirement, and of the causation, in order to preserve the limited nature of forfeiture. Otherwise, forfeiture will become a wholesale exception to *Crawford* that will inevitably nullify any significant protection against hearsay under the Confrontation Clause.

Finally, the failure to enforce the intent requirement in *Giles* has the paradoxical effect of reducing confrontation because relying on forfeiture may be easier for the prosecution than finding and producing a witness. The prosecution gains in many cases when it admits absent witness testimony because the real witness, with all the inevitable warts, does not appear before the jury, and the critical testimony is presented by an authority figure who presents a statement that cannot be qualified, modified, or retracted.

IV. ISSUES IN ENFORCING *GILES*

A. *The Critical Issues of Intent and Causation*

The forfeiture doctrine requires proof of wrongdoing, proof that the wrongdoing was intended to prevent the witness from testifying, and proof that the wrongdoing did, in fact, prevent the appearance of the

⁵⁹ Flanagan, *Confrontation, Equity, and the Mismnamed Exception*, *supra* note 12, at 1231.

⁶⁰ See, e.g., Adam M. Krischer, "Though Justice May be Blind, It is Not Stupid": Applying Common Sense to *Crawford* in Domestic Violence Cases, 38 PROSECUTOR, Nov.–Dec. 2004, at 14 (arguing that perpetrators of domestic violence automatically forfeited their right to confront victims).

witness.⁶¹ One critical issue is the proof of intent, and in particular, whether it can be inferred solely from an abusive relationship. The second critical issue is the causal link between the defendant's wrongdoing and the witness's unavailability. This in turn has two subparts: did the witness have independent reasons for not appearing, and did the government fail in its obligation to produce the witness? Either one, I maintain, prevents forfeiture from operating even if the defendant had the requisite intent. Each of these points merits more detailed examination below.

B. The Causal Link Between Intent to Harm the Witness and the Failure to Appear

Davis states that the prosecution must establish the elements for forfeiture by wrongdoing by a preponderance of the evidence.⁶² What is not clear is whether the prosecution must show that the defendant's intention to prevent testimony was a factor, a significant factor, the primary factor, or the sole factor, for his acts against the witness.⁶³ A similar question must be asked about the witness's motivation. Must the wrongdoing be only a factor, a significant factor, the primary factor, or the sole factor in the witness's refusal to testify? For the reasons developed below, both issues should be resolved by a "but for" test. That is, the judge should determine whether the wrongdoing would have occurred "but for" the defendant's desire to prevent the witness from testifying. The court then would determine whether, "but for" the intentional wrongdoing, the witness would have testified.

There are only scattered references defining this connection in the case law. A few courts have held that the defendant could be held to have intended to prevent testimony so long as the victim's potential testimony was "a factor" in the decision to act against the witness.⁶⁴ Another formulation asks whether witness intimidation was in "any way" a motivation.⁶⁵ At the same time, courts have specifically rejected a requirement that the witness tampering be the sole motive for intimidating the witness.⁶⁶

⁶¹ This formulation is taken from the language of the Federal Rules of Evidence, which codified the forfeiture rule. FED. R. EVID. 804(b)(6). See also *Davis*, 547 U.S. at 833.

⁶² *Davis*, 547 U.S. at 833.

⁶³ Justice Breyer adverted to this issue in the *Giles* dissent. 128 S. Ct. at 2699 (Breyer, J., dissenting).

⁶⁴ *United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001); *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996); *United States v. Johnson*, 219 F.3d 349, 356 (4th Cir. 2000).

⁶⁵ *State v. Romero*, 133 P.3d 842, 856 (N.M. Ct. App. 2006), *aff'd*, 156 P.3d 694 (N.M. 2007).

⁶⁶ *Dhinsa*, 243 F.3d at 654; *Houlihan*, 92 F.3d at 1279.

The "a factor" test is vastly over-inclusive, and if strictly applied would all but eliminate the intent element of the forfeiture doctrine because it can be satisfied so easily. It requires only minimal evidence and does not require consideration of contrary evidence. Nor does it require that the court weigh all of the evidence, pro and con, and conclude which reason, more likely than not, was the motivation for the defendant's acts. Applied strictly, forfeiture could be found whenever intimidation and refusal occur although the wrongdoing was not a primary, or even a significant, reason for the defendant's actions or the witness's absence.

The preponderance standard is often viewed as a "more probably so than not" test.⁶⁷ This is the appropriate test for causation under *Giles*. The preponderance test requires a finding of the most likely cause. Forfeiture is appropriate if the most likely motivation for the act was to prevent the person from appearing as a witness, and if that act was the most likely reason for the witness not appearing. Stated another way, would the wrongdoing have occurred but for the potential to testify, and would the witness have appeared but for the wrongdoing? The "but for" test properly asks whether the wrongdoing was the predominant factor in the chain of causation.⁶⁸ Finally, the intent should be determined at the time of the defendant's wrongdoing, and the witness's motivation at the time of the failure to appear.

There are several reasons for articulating the burden in this way. At stake is a constitutional right to object to constitutionally-suspect testimonial hearsay and the reliability of the verdict. It is important for the trial judge to examine the evidence carefully and to consider alternative evidence of causation. The only significant and detailed examination of the evidence will be by the trial judge. The appellate court will review under an abuse of discretion standard, and, almost certainly, will defer to the trial judge. Finally, the prosecution has an independent obligation to produce the witness, and there is a separate question of whether the witness could have appeared if the police had made the appropriate efforts, rather than relying on the expectation that forfeiture would be applied.

C. *Strengthening the Prosecution's Burden of Establishing the "Unavailability" of the Witness*

The prosecution has the independent constitutional obligation to produce the witness for testimony in its case in chief. The current law on the government's obligation to prove the witness's unavailability is ambiguous in form and lenient in application. The Supreme Court held that the government had a "good faith" obligation to obtain the witness

⁶⁷ CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 3.3, at 109 (3rd ed. 2003).

⁶⁸ Flanagan, *Foreshadowing the Future*, *supra* note 12 at 896–97.

for trial in *Barber v. Page*.⁶⁹ The government was required to use the writ of *habeas corpus ad testificandum* in *Barber* to produce a witness known to be in prison in a neighboring state, but was excused from efforts to return a witness from Sweden in *Mancusi v. Stubbs*.⁷⁰ In *Ohio v. Roberts*, the government's delivery of a subpoena to the home of the witness's parents in Ohio was deemed sufficient, although it was known that she was in California.⁷¹ This is inconsistent with the language of the opinion:

The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation.⁷²

In practice, the lower courts seem to accept a wide variety of excuses from the government for the witness's unavailability.⁷³

Crawford and *Giles* require that the unavailability standard be reexamined and strengthened for at least two reasons. First, the constitutional requirements for hearsay were unformed when *Barber* and *Mancusi* were decided. Then, *Crawford* and *Davis* rejected the reliability standard adopted by *Roberts* in 1980. Consequently, these cases should be reexamined in light of *Crawford*'s emphasis on the opportunity for cross-examination. Moreover, each defendant in those cases had some prior opportunity to cross-examine the witness, so the essentials of confrontation occurred, at least under the constitutional standards of the time.⁷⁴ To the extent that the hearsay was reliable, and also subject to some prior cross-examination, the Court had little reason to seriously consider whether the government had discharged its obligation to produce the witness. Consequently, the Court was willing to accept rather perfunctory efforts of the police at that time.

Crawford eliminated those props to the "good faith" standard. All testimonial hearsay is uncontroverted and reliability is no longer the

⁶⁹ 390 U.S. 719, 724–25 (1968).

⁷⁰ 408 U.S. 204, 211–13, 216 (1972).

⁷¹ 448 U.S. 56 (1980).

⁷² *Id.* at 74.

⁷³ Raymond LaMagna, *(Re)Constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. CAL. L. REV. 1499, 1550–52 (2006) (discussing examples of the minimal standards for determining unavailability).

⁷⁴ *Barber v. Page*, 390 U.S. 719, 722 (1968) (noting that confrontation can be excused because "cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement," but finding no effort to obtain attendance through available means); see generally *Mancusi*, 408 U.S. 204 (challenge to conviction enhancement based upon prior trial where trial testimony of witness admitted in lieu of obtaining now foreign domiciled witness to appear); *California v. Green*, 399 U.S. 149, 166–67 (1970) (preliminary hearing testimony admitted where witness was subject to cross-examination and claimed lack of memory); *Roberts*, 448 U.S. 56 (preliminary hearing testimony of absent witness admitted, and the reliability standard announced).

constitutional standard. The only protection provided by the Confrontation Clause is the procedural opportunity to confront the witness. The constitutional protection is dependent on whether the government produces or is excused from producing the witness at trial. This in turn requires that the standard for establishing unavailability be strengthened because of the perverse incentive for the police and prosecutors to avoid seeking the witness when the testimonial hearsay can be admitted under the forfeiture rule. In many cases testimonial hearsay has significant advantages for the government. A strong standard for unavailability directs the police and prosecutor to exhaust all available means of locating and producing the witness and ultimately results in more confrontation.⁷⁵

I suggest that the "good faith effort" of *Barber* is inadequate for the times because it focuses on the attitude of law enforcement, but not the reasonableness of its efforts. Moreover, the Supreme Court's case law seems limited only to requiring the use of available judicial procedures.⁷⁶ This is a particularly narrow approach to the obligation of producing witnesses when it is now clear that support services to complaining witnesses are particularly helpful in encouraging the needed testimony.⁷⁷

Due diligence is a better standard because it shifts the focus from good intentions to objective steps the prosecution could have taken in locating and producing the witness. The reality is that the prosecution often successfully uses investigative techniques to find reluctant witnesses, so there is a readily available objective standard to determine whether the prosecution has satisfied its obligations. Today, with cell phones that reveal locations, due diligence requires more than reliance on the judicial process of a subpoena. It requires attention to the needs of the witness. It is well established that support programs for witnesses improve

⁷⁵ The unavailability requirement has not escaped the attention of the advocates for a broadened forfeiture rule. In an Essay apparently written before *Giles*, one commentator proposed that any act by the defendant that makes testifying more difficult for the witness is sufficient. Aaron R. Petty, *The Unavailability Requirement*, 102 NW. U. L. REV. COLLOQUY 239, 243 (2008). This conclusion was reached by comparing the rationale for admitting prior sworn testimony with that of forfeited testimony, without noting the fundamental differences between admitting sworn testimony subject to cross-examination and admitting unsworn and unconfounded hearsay. Nor does the author consider the inherent institutional values of confrontation in insuring the reliability and fairness of a trial, which is the purpose of the Sixth Amendment.

⁷⁶ The Court required the prosecution to use the writ of *habeas corpus ad testificandum* in *Barber*. 390 U.S. at 724. However, in *Mancusi*, attendance was excused because of the lack of procedures to bring foreign witnesses into this country. 408 U.S. at 211–13. *Roberts* found the useless act of delivering a subpoena to a location where the witness admittedly had not resided for years was acceptable. 448 U.S. at 74–75.

⁷⁷ Devine, *supra* note 53, at 30 (describing program that produced appearance rates of complaining witnesses of eighty percent, and conviction rates in misdemeanor cases of ninety percent).

appearance rates. The simple expedient of providing transportation expenses should be required. The government simply can't wait until the last minute to address the problem of witnesses who are known to be reluctant. If the Confrontation Clause is to be a meaningful protection, the unavailability standard must be sufficiently rigorous to produce the witness in all but the extreme cases.

A corollary of the government's enhanced obligation of the prosecution to produce the witness may be the duty to provide an alternative to confrontation at trial, as argued by Professor Friedman.⁷⁸ The prosecution's obligation to provide an opportunity for cross-examination pre-trial fits well into the concept of due diligence. When the government is aware that there are risks that the witness might not appear at trial, it must respond with efforts to provide confrontation by other means.⁷⁹

V. THE INFERENCE FROM A RELATIONSHIP INVOLVING DOMESTIC VIOLENCE

A. *Giles Requires Individualized Proof of Intent*

There are many cases where the prosecution can establish the defendant's intent was to keep the witness from the courtroom by the witness's⁸⁰ or defendant's own statements.⁸¹ The more problematic situation, and the one where a strict standard of proof is essential, occurs when there is no evidence in the record that a prosecution is pending, or that the defendant has used force to prevent the witness from seeking the help of the authorities. That is, there is no individualized evidence of intent or causation, but there have been incidents of domestic violence between them.

Justice Scalia's opinion for the Court, Justice Souter's concurrence, and Justice Breyer's dissent in *Giles* addressed the inference from an abusive relationship. I read the opinion for the Court, and the concurring opinion of Justice Souter, to require substantially more than mere proof of an abusive relationship. The Court, in fact, requires that, over and above the existence of an abusive relationship, that there be evidence that is sufficient to support the inference that the defendant's

⁷⁸ See *supra* note 42, and accompanying text.

⁷⁹ See, e.g., *People v. Moreno*, 160 P.3d 242 (Colo. 2007) (noting that prosecution rejected defense request to interview child witness out of the presence of the defendant).

⁸⁰ See, e.g., *United States v. Montague*, 421 F.3d 1099, 1104 (10th Cir. 2005) (witness related conversations with defendant urging her not to testify against him).

⁸¹ See, e.g., *Vasquez v. People*, 173 P.3d 1099, 1105 (Colo. 2007) (affirming forfeiture because of defendant's statement that he killed her because she "set [him] up"); *Pena v. People*, 173 P.3d 1107, 1110 (Colo. 2007) (affirming forfeiture because of defendant's efforts to persuade her not to testify and a motive to kill because of pending charges).

goal was to interfere with the juridical processes by keeping the witness away.

Justice Scalia, writing for the majority, articulates a requirement of individual proof, and rejects simplistic, generalized inferences:

The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify. This is not, as the dissent charges, *post*, at 2708, nothing more than “knowledge-based intent.”⁸²

Justice Scalia’s test is rooted in the purpose of the forfeiture doctrine. Constitutional rights can be forfeited only when there is evidence that the defendant was manipulating the juridical process. The defendant’s acts must be sufficient to support the inference that he sought to prevent the victim from cooperating with the police or criminal prosecution. The determination of intent or purpose must be viewed in the context of all of the facts; particularly relevant are prior threats to isolate from outside help, and an ongoing criminal proceeding where the victim was expected to testify, which supplies an obvious motive.

Justice Scalia explicitly rejects any suggestion that this is the “knowledge-based intent,” argued by Justice Breyer, where the defendant must know that a homicide will prevent the witness from testifying. The rejection of Breyer’s argument necessarily rejects any proof of intent based solely on the nature of the crime of domestic violence.

The concurring opinion of Justice Souter, joined by Justice Ginsburg, supports this view of the inference to be drawn from a history of domestic violence.⁸³

⁸² *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

⁸³ The concurring justices agreed with the Court’s opinion in all but Part II(D)(2), where Justice Scalia criticizes Justice Breyer’s view as one that would make constitutional rights “subject to whatever exceptions courts from time to time consider ‘fair.’” *Id.* at 2692. Souter and Ginsburg are not in full agreement with Justice Scalia’s predominant reliance on history at the time of the adoption of the Bill of Rights. Although they agree that history supports the intent requirement, they note that “today’s understanding of domestic abuse had no apparent significance at the time of the Framing, and there is no early example of the forfeiture rule operating in that circumstance.” *Id.* at 2694–95 (Souter, J., concurring in part).

The second [reason in favor of the Court's view of forfeiture] is the absence from the early material of any reason to doubt that the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger.⁸⁴

Read with its qualifications, it is in accord with Justice Scalia's opinion for the Court. The intent to prevent testimony is established by proof of an abusive relationship that *is meant* to isolate a victim from help, including help from the authorities or judicial process. Justice Souter adds that when a defendant has isolated a victim from the judicial process, that intent would not necessarily be negated by an impulsive homicide.⁸⁵ The concurrence deduces the necessary intent to prevent testimony from the acts in a "classic abusive relationship" intended to isolate the witness from the authorities. Clearly, many other relationships do not meet the as yet undefined "classic abusive relationship."

Justice Breyer, joined by Justices Kennedy and Stevens, rejected a requirement of proving the necessary intent in favor of presuming it, as the logical consequence of the act of homicide is the unavailability of the witness.⁸⁶ In cases of intimate abuse, however, Justice Breyer reads Justice Souter's concurrence to mean that a history of domestic violence is sufficient to establish intent, presumably on the theory that a natural and probable consequence of domestic violence is that the witness will not

⁸⁴ *Id.* at 2695 (Souter, J., concurring in part).

⁸⁵ *Id.*

⁸⁶ There are significant problems with Justice Breyer's theory of inferred intent. First, it is only a presumption, and the Constitution prohibits mandatory presumptions, so it is only a permissive inference of dubious validity without proof. *Ulster County Court v. Allen*, 442 U.S. 140 (1979). More importantly, this presumption is used in criminal law to infer intent from the immediate and direct consequence of a voluntary criminal act. Justice Breyer's example is that a defendant, intending to kill one person by bombing a plane, cannot escape criminal liability for all those that also died, although he did not directly intend to kill them. The strength of that inference, and its viability under the Due Process Clause, however, declines the further one moves away in space and time from the intentional act. It is reasonable to extend the defendant's intent to kill a specific person on the plane to the unknown passenger in seat 23A because it is an immediate consequence of the bombing. However, it is not reasonable to infer that because of the bomb the defendant also intended to keep his victim, and any other passenger, from eating at a restaurant to be opened six months later, and then making the inferred intention to keep the victim from that lunch the decisive finding in denying a constitutional right necessary for the reliability of the verdict. That is exactly what inferred intent does, however, when wrongdoing committed without any relationship to the judicial process is used to infer intent to keep the witness away from trial. The logic is strained to the breaking point and was rightly rejected in the context of the forfeiture rule.

appear at trial, even if physically able to testify.⁸⁷ Justice Breyer would find forfeiture on substantially less than would the Court, perhaps only on a showing that the defendant committed an act of domestic abuse involving the witness from which it might be foreseen that the witness would not appear at trial.⁸⁸

The Court, of course rejected the dissent's position. Something more than domestic violence or an abusive relationship is required. Evidence must establish that the defendant's acts were aimed at controlling the victim, and preventing her from seeking the assistance of the authorities. There are many cases where this can be shown, but it is equally true that there are many cases where the wrongdoing, violence or otherwise, does not rise to that level, and where forfeiture is inappropriate. Likewise, there are cases where the witness's behavior is based upon private considerations that are not chargeable to the defendant.

B. Some Cautionary Thoughts on the Use of Expert Testimony to Prove Causation and Intent

The absence of any independent evidence of the defendant's intent inevitably will lead to attempts to use expert testimony to establish both motivation and causation. This should be approached with caution because of the great potential for producing error by substituting generalizations for specific proof of the individual. Too casual an approach to expert testimony on intent is another means by which that critical requirement may be eroded and confrontation reduced. I offer only an overview, with all the inherent limitations that implies, in the expectation that it will lead to a more detailed discussion on this topic.

Federal Rule of Evidence 702 requires an examination of the reliability of the principles, the sufficiency of the data, and the reliability of its application in the particular case. There are significant issues in each of these categories. The most problematic aspect of expert testimony is that it is likely to offer a simplistic approach to the issue of causation, most likely a claim that domestic violence is about control in the relationship, and hence any wrongdoing must have been meant to

⁸⁷ *Giles*, 128 S. Ct. at 2709 (Breyer, J., dissenting).

⁸⁸ The dissent might be read to be consistent with the opinions of Justice Scalia and Justice Souter. Justice Breyer reads Justice Souter's concurrence "to say that a showing of domestic abuse is sufficient to call into play the protection of the forfeiture rule in a trial for murder of the domestic abuse victim." *Id.* at 2708. In conclusion, Justice Breyer states: "Insofar as Justice SOUTER's rule in effect presumes 'purpose' based on no more than evidence of a history of domestic violence, I agree with it." *Id.* at 2709. Read together, they could mean that a showing of domestic abuse is sufficient to raise the issue of forfeiture (but it is not conclusive evidence for forfeiture) unless the history of domestic violence is such that it establishes the intent to control the victim, so that it can be inferred he did not want her to testify. The dissent's willingness to presume intent based upon the nature of the crime is inconsistent with this view.

keep the witness from testifying. There is, however, no agreed theory about the psychology causing domestic violence, or the motivation of those involved.⁸⁹

Moreover, what is established about the motivation is limited. For example, the first study that claims to provide quantitative evidence suggesting assaults by men on female partners are more likely to involve a control motive than other assaults, also states that the authors “cannot determine for any particular case whether control is the only motive, the dominant motive, or a subordinate motive.”⁹⁰ Yet that is the most important question in forfeiture by wrongdoing. The authors also note that statistical evidence on the control motive is almost nonexistent, and the studies that exist are based on self-reporting, limited samples, and yielded inconsistent results.⁹¹ These are the conclusions of one Article, of course, but they do suggest some fundamental weaknesses in the control hypothesis.

There are issues of definition. Domestic violence is a continuum from isolated verbal taunts to repeated assaults, and in some cases, intentional homicides. Some appropriate definition of domestic violence is critical and must be used consistently. One test used by psychologists asks whether the person ever “pushed, grabbed or shoved; slapped, kicked, bit, hit with a fist or an object; beat up; threatened with a knife or gun; or used a knife or gun against your partner?”⁹² One incident apparently constitutes abuse, and provides at least an argument for an abusive relationship because it is between domestic partners. The definition is so broad that any inference would be over-inclusive in the context of a criminal trial.⁹³

There is also the “fit” between the expert’s background and testimony and the particular facts of the case before the court. There is

⁸⁹ See Burke, *supra* note 52, at 569 (citing NEIL JACOBSON & JOHN GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS 55 (1998)); see also DONALD G. DUTTON, RETHINKING DOMESTIC VIOLENCE 62–129 (2006) (reviewing the various theories of wife assault).

⁹⁰ Ronald B. Felson & Steven F. Messner, *The Control Motive in Intimate Partner Violence*, 63 SOC. PSYCHOL. Q. 86, 91 (2000).

⁹¹ *Id.* at 87.

⁹² DONALD G. DUTTON & SUSAN K. GOLANT, THE BATTERER: A PSYCHOLOGICAL PROFILE 22 (1995) (describing a question of the Tactic Conflicts Scale).

⁹³ Another example of broad generalizations is the repeated statement that a high percentage of victims do not cooperate with the prosecution. See, e.g., *People v. Brown*, 94 P.3d 574, 576 (Cal. 2004) (noting that an expert testified that eighty to eighty-five percent of victims recant at some point); *People v. Gomez*, 85 Cal. Rptr. 2d 101, 105 (Cal. Ct. App. 1999) (noting that an expert testified that eighty to eighty-five percent of domestic violence witnesses, recant, change or minimize the incident). That assertion is an over-generalization, and does not define what cooperation, recant, or minimize means. It does not provide any information about how many witnesses do testify for the prosecution, nor how many do not and the reason for the refusal. The source of this information is experiential witnesses who do not cite a source for it, which implies that it is an estimate, at best.

research on the small group of serial batterers, but conclusions based on extreme behavior are appropriate for only that restricted class, and not for the great majority of cases.⁹⁴ In most cases of forfeiture, there is also an important and inherent limitation on the use of expert testimony regarding the motivation of the defendant and of the now unavailable witness. Neither can be interviewed by the expert, so any information about them, and their motivation, will necessarily be provided by others and subject to substantial errors of emphasis, omission, and reliability. There is no independent way to verify the information is correct and complete. As this short discussion indicates, expert testimony fits the particular case only when the data on which the testimony is based clearly matches the facts of the particular case in severity, frequency, and the psychological profile of the defendant. In other cases that lack such a fit, the probative value is substantially less, and in some cases, it is nonexistent.

I have some concerns about the utility of this expert testimony. The basis of the testimony is prior bad acts which have a recognized prejudicial potential.⁹⁵ If expert testimony is offered solely as background information, as much syndrome evidence is, there is a substantial problem of guilt by diagnostic association rather than actual proof. True, the evidence is presented solely to the judge for the pretrial ruling on forfeiture, but that does not eliminate the concerns. If it is offered because the judge is unfamiliar with domestic violence, the evidence retains its impact. This is the same concern as expressed in the Court's opinion in *Giles* about the effect of pre-trial judgments of guilt.⁹⁶ If the judge is experienced, then what is its value in that case? I also offer the observation that expert testimony is a two-edged sword for the prosecution. The focus has been on the defendant's motivation, but the witness's motivation is equally important. Whatever standard is used for determining the admission of expert testimony by the prosecution also must be available for the defense. I strongly favor individualized proof of intent and causation in both instances, rather than the generalizations of expert testimony.

Forfeiture by wrongdoing is an equitable principle, but equity is a two-way street. One may also question the justification for resorting to expert testimony when there are so often comparable victim statements available from nongovernment witnesses, or nontestimonial statements. Why is expert testimony necessary? If the reason is that it is easier for the prosecution to find one expert, than actually prove unavailability in

⁹⁴ See DUTTON & GOLANT, *supra* note 92, at 22–23.

⁹⁵ Myrna S. Raeder, *The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence*, 68 U. COLO. L. REV. 147, 160–61 (1997) (noting that the weight of authority views batterers' profiles as impermissible character evidence); see also FED. R. EVID. 404.

⁹⁶ *Giles v. California*, 128 S. Ct. 2678, 2686, 2692, 2694 (Souter, J., concurring).

individual cases or make the effort to produce the witness, that is certainly inadequate.

Finally, the issue at its core is not one of psychology, but a determination of what the legal standard should be in establishing the intent to prevent testimony and the motivation of the unavailable witness.⁹⁷ Only the intent to isolate the witness from the authorities is sufficient under *Giles*. Acts that do not amount at least to isolation from the authorities are insufficient. Similarly, for the witness, the issue is not whether testifying is stressful, whether it flows from the witness's personal desires, or whether there is a lack of due diligence by the prosecution, but whether it flows from the wrongdoing. In my view, legal considerations require a high standard of proof on all of these issues because confrontation is a trial right essential to the integrity of the judicial process.

VI. CONCLUSION

In *Giles*, Justice Scalia, as he did with the definition of "testimonial" in *Crawford*, left the lower courts to sort out the means and methods of proving intent and causation. *Crawford* emphasized the importance of confrontation, and *Giles* reflects that importance because it requires an intentional interference with the judicial process. Violence between intimate partners presents the most difficult challenge for the continued vitality of the purpose requirement of *Giles*. Unless careful attention is paid to the issues involved, the essentially limited nature of the forfeiture rule may be eroded by minimal standards of proof on its critical elements. We do have an intent requirement *if* we can keep it. And, if we cannot, forfeiture will become a broad exception in practice, and *Crawford* will have a very limited effect. Indeed, the result might be that the forfeiture rule will be the means of actually reducing confrontation. Failing to require individualized proof will expand this exception, undermine *Crawford*, and provide an incentive to use hearsay rather than focus on bringing the witness to the court.

⁹⁷ FED. R. EVID. 704(b) (prohibiting expert testimony on the ultimate issue of the defendant's mental state in a criminal trial). This reflects the concern that expert opinion may have a disproportionate effect on the jury.